Elements of Selected Criminal Traffic Offenses

Chapter 9

Summary of Contents

9.1 Scope Note

The traffic-related offenses covered in this chapter are commonly committed by juveniles. For each offense, we have included the following information:

- **F** the pertinent portions of the statute;
- **F** the elements of the offense;
- **F** the licensing and vehicle sanctions; and
- **F** issues surrounding the offense.

The elements of the offenses are either quoted from CJI2d or gleaned from the statute itself.

9.2 Attempt to Commit a Crime

The general attempt statute is proper only where there is no express provision for attempt in the statute under which defendant is charged. *People v Etchison*, 123 Mich App 448, 452 (1983), and *People v Denmark*, 74 Mich App 402, 416 (1977).

A. General Attempt Statute

"Attempt to commit crime—Any person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same, when no express provision is made by law for the punishment of such attempt, shall be punished as follows:

"1. If the offense attempted to be committed is such as is punishable with death, the person convicted of such attempt shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years;

"2. If the offense so attempted to be committed is punishable by imprisonment in the state prison for life, or for 5 years or more, the person convicted of such attempt shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or in the county jail not more than 1 year;

"3. If the offense so attempted to be committed is punishable by imprisonment in the state prison for a term less than 5 years, or imprisonment in the county jail or by fine, the offender convicted of such attempt shall be guilty of a misdemeanor, punishable by imprisonment in the state prison or reformatory not more than 2 years or in any county jail not more than 1 year or by a fine not to exceed 1,000 dollars; but in no case shall the imprisonment exceed 1/2 of the greatest punishment which might have been inflicted if the offense so attempted had been committed."

MCL 750.92; MSA 28.287.

Attempts to violate any Vehicle Code provision (or any provision from another jurisdiction that substantially corresponds to a Vehicle Code provision) must be treated as completed offenses for purposes of imposing criminal penalties, licensing sanctions, or vehicle sanctions. MCL 257.204b; MSA 9.1904(2) provides:

"(1) When assessing points, taking licensing or registration actions, or imposing other sanctions under this act for a conviction of an attempted violation of a law of this state, a local ordinance substantially corresponding to a law of this state, or a law of another state substantially corresponding to a law of this state, the secretary of state or the court shall treat the conviction the same as if it were a conviction for the completed offense.

"(2) The court shall impose a criminal penalty for a conviction of an attempted violation of this act or a local ordinance substantially corresponding to a provision of this act in the same manner as if the offense had been completed."

B. Elements

1. Defendant intended to commit a certain crime, which is defined as [state elements from the appropriate instructions defining the crime]; and

2. Defendant took some action toward committing the alleged crime, but failed to complete the crime.

CJI2d 9.1.

"Things like planning the crime or arranging how it will be committed are just preparations; they do not qualify as an attempt. In order to qualify as an attempt, the action must go beyond mere preparation, to the point where the crime would have been completed if it hadn't been interrupted by outside circumstances. To qualify as an attempt, the act must clearly and directly be related to the crime that the defendant is charged with attempting and not some other objective." *Id.*

If factually appropriate, the jury may be instructed that they may find the defendant guilty of attempt even though the evidence convinces them that the crime was completed. *Id.*

C. Licensing Sanctions

Licensing sanctions for a conviction of the attempted offense are listed under each traffic offense.

Misdemeanors

9.3 Transporting or Possessing Open Alcohol in a Motor Vehicle

A. Statute

"(1) Except as provided in subsection (2), a person who is an operator or an occupant shall not transport or possess alcoholic liquor in a container that is open or uncapped or upon which the seal is broken within the passenger compartment of a vehicle upon a highway, or within the passenger compartment of a moving vehicle in any place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, in this state."

"(2) A person may transport or possess alcoholic liquor in a container that is open or uncapped or upon which the seal is broken within the passenger compartment of a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles in this state, if the vehicle does not have a trunk or compartment separate from the passenger compartment, the container is enclosed or encased, and the container is not readily accessible to the occupants of the vehicle."

"(3) A person who violates this section is guilty of a misdemeanor. As part of the sentence, the person may be ordered to perform community service and

undergo substance abuse screening and assessment at his or her own expense. . . ."

"(4) This section does not apply to a passenger in a chartered vehicle authorized to operate by the state transportation department."

MCL 257.624a; MSA 9.2324(1).

B. Elements

1. Defendant was an operator or occupant of a motor vehicle at the time of the alleged offense.

2. Defendant transported or possessed alcohol in a motor vehicle on a highway, *or*

2. Defendant transported or possessed alcohol in a moving vehicle in any place open to the general public or generally accessible to motor vehicles, including an area designated for parking; and

3. The alcohol was in a container that was open, uncapped, or had a broken seal and was within the passenger compartment of the vehicle.

C. Licensing Sanctions

2 points. Only the driver's conviction is reported to the Secretary of State. MCL 257.320a(1)(l); MSA 9.2020(1)(1)(a).

If the person has one prior conviction for a violation of §624a, §624b, MCL 436.1703; MSA ___.___, or former MCL 436.33b(1); MSA 18.1004(2)(1), the Secretary of State shall suspend the defendant's driver's license for 90 days. A restricted license may be issued after the first 30 days of suspension. MCL 257.319(7); MSA 9.2019(7).

If the defendant has two or more prior convictions of these offenses, a one-year suspension is mandatory. A restricted license may be issued after the first 60 days of suspension. MCL 257.319(7); MSA 9.2019(7).

D. Issues

A person does not violate this statute if they transport open intoxicants in the passenger compartment of a motor vehicle that does not have a separate trunk compartment if:

- the open container is enclosed or encased, and
- the open container is not readily accessible to the occupants of the vehicle.

MCL 257.624a(2); MSA 9.2324(1)(2).

For a violation of Minor Transporting or Possessing Alcohol in a Motor Vehicle under MCL 257.624b; MSA 9.2324(2), it is not necessary that the intoxicant be opened, uncapped, or unsealed.

For the requirements for ordering substance abuse screening and assessment, see MCL 436.1703(3); MSA ___.___.

9.4 Minor Possessing or Transporting Alcohol in a Motor Vehicle

A. Statute

"(1) A person less than 21 years of age shall not knowingly transport or possess alcoholic liquor in a motor vehicle as an operator or occupant unless the person is a licensee under the Michigan liquor control code. . . , a common carrier designated by the liquor control commission . . . , the liquor control commission, or an agent of the liquor control commission and is transporting or having the alcoholic liquor in a motor vehicle under the person's control during regular working hours and in the course of the person's employment. This section does not prevent a person less than 21 years of age from knowingly transporting alcoholic liquor in a motor vehicle if a person at least 21 years of age is present inside the motor vehicle. A person who violates this subsection is guilty of a misdemeanor. As part of the sentence, the person may be ordered to perform community service and undergo substance abuse screening and assessment at his or her own expense . . . .

. . . .

"(4) A person who knowingly transfers title to a motor vehicle for the purpose of avoiding this section is guilty of a misdemeanor."

MCL 257.624b(1) and (4); MSA 9.2324(2)(1) and (4).

B. Elements

1. Defendant was an operator or occupant of a motor vehicle at the time of the alleged offense;

2. Defendant was less than 21 years of age;

3. Defendant knowingly transported or possessed alcohol in a motor vehicle;

4. Defendant was not employed by a licensee under the Michigan Liquor Control Code, a common carrier designated by the Liquor Control Commission, the Liquor Control Commission, or an agent of the Liquor Control Commission transporting or having the alcohol in a motor vehicle under the defendant's control during regular working hours and in the course of the defendant's employment; and

5. A person who was at least 21 years of age was not also in the motor vehicle at the time of the alleged offense.

C. Impoundment

Impoundment of the vehicle shall be authorized by court order for a period of not less than 15 days or more than 30 days, "[i]f the court determines upon the hearing of the order to show cause, from competent and relevant evidence, that at the time of the commission of the violation the motor vehicle was being driven by the person less than 21 years of age with the express or implied consent or knowledge of the owner in violation of subsection (1), and that the use of the motor vehicle is not needed by the owner in the direct pursuit of the owner's employment or the actual operation of the owner's business. ..." MCL 257.624b(3); MSA 9.2324(2)(3).

To start, a complaint must be filed by the arresting officer or the officer's superior within 30 days after the conviction becomes final requesting that the motor vehicle be impounded. The court shall then issue an order for a hearing to the owner of the motor vehicle to show cause why the motor vehicle should not be impounded. The hearing date in the order shall not be less than 10 days after the issuance of the order. The order shall be served by delivering a true copy to the owner, or if the owner cannot be located by sending a true copy by certified mail, not less than 3 full days before the hearing date. MCL 257.624b(2); MSA 9.2324(2)(2).

The court order authorizing impoundment allows a law enforcement officer to take possession wherever the motor vehicle is located and to store the vehicle in a public or private garage at the expense and risk of the owner. MCL 257.624b(3); MSA 9.2324(2)(3).

D. Licensing Sanctions

2 points. Only the driver's conviction is reported to the Secretary of State. MCL 257.320a(1)(l); MSA 9.2020(1)(1)(a).

If the person has one prior conviction for a violation of §624a, §624b, MCL 436.1703; MSA ___.___, or former MCL 436.33b(1); MSA 18.1004(2)(1), the Secretary of State shall suspend the defendant's driver's license for 90 days. A restricted license may be issued after the first 30 days of suspension. MCL 257.319(7); MSA 9.2019(7).

If the defendant has two or more prior convictions of these offenses, a one-year suspension is mandatory. A restricted license may be issued after the first 60 days of suspension. MCL 257.319(7); MSA 9.2019(7).

E. Issues*

*See Section 2.3 for special notice requirements when a minor is charged with a violation of this statute.

It is not necessary that the intoxicant be opened, uncapped, or unsealed, unlike Transporting or Possessing Open Alcohol in a Motor Vehicle under MCL 257.624a; MSA 9.2324(1).

For the requirements for ordering substance abuse screening and assessment, see MCL 436.1703(3); MSA ___.___.

9.5 Minor Purchasing, Consuming, or Possessing Alcohol

A. Statute

"(1) A minor shall not purchase or attempt to purchase alcoholic liquor, consume or attempt to consume alcoholic liquor, or possess or attempt to possess alcoholic liquor, except as provided in this section. Notwithstanding section 909, a minor who violates this subsection is guilty of a misdemeanor punishable by the following fines and sanctions, and is not subject to the penalties prescribed in section 909:

"(a) For the first violation a fine of not more than $100.00, and may be ordered to participate in substance abuse prevention or substance abuse treatment and rehabilitation services. . . , and may be ordered to perform community service and to undergo substance abuse screening and assessment at his or her own expense. . . .

"(b) For a violation of this subsection following a prior conviction or juvenile adjudication for a violation of this subsection or [former MCL 436.33b(1); MSA 18.1004(2)(1)], a fine of not more than $200.00, and may be ordered to participate in substance abuse prevention or substance abuse treatment and rehabilitation services. . . , to perform community service, and to undergo substance abuse screening and assessment at his or her own expense. . . .

"(c) For a violation of this subsection following 2 or more prior convictions or juvenile adjudications for a violation of this subsection or [former MCL 436.33b(1); MSA 18.1004(2)(1)], a fine of not more than $500.00, and may be ordered to participate in substance abuse prevention or substance abuse treatment and rehabilitation services. . . , to perform community service, and to undergo substance abuse screening and assessment at his or her own expense. . . .

. . . .

"(7) This section does not prohibit a minor from possessing alcoholic liquor during regular working hours and in the course of his or her employment if employed by a person licensed by this act, by the commission, or by an agent of the commission, if the alcoholic liquor is not possessed for his or her personal consumption.

. . . .

"(10) The consumption by a minor of sacramental wine in connection with religious services at a church, synagogue, or temple is not prohibited by this act.

MCL 436.1703(1), (7), and (10); MSA ___.___.

B. Elements

1. Defendant was less than 21 years of age.

2. Defendant purchased or attempted to purchase, consumed or attempted to consume, or possessed or attempted to possess alcoholic liquor.

3. Defendant did not possess the alcoholic liquor for his or her personal consumption during regular working hours in the course of his or her employment by a person licensed under the Liquor Control Code, an agent of the Liquor Control Commission, or the commission itself.*

*There are also exceptions contained in subsections (9) and (11) of the statute.

4. Defendant did not consume the alcoholic liquor in connection with a religious service.

C. Licensing Sanctions

No points. The conviction is reported to the Secretary of State.

If the person has one prior conviction for a violation of §624a, §624b, MCL 436.1703; MSA ___.___, or former MCL 436.33b(1); MSA 18.1004(2)(1), the Secretary of State shall suspend the defendant's driver's license for 90 days. A restricted license may be issued after the first 30 days of suspension. MCL 436.1703(4); MSA ___.___, and MCL 257.319(7); MSA 9.2019(7).

If the defendant has two or more prior convictions of these offenses, a one-year suspension is mandatory. A restricted license may be issued after the first 60 days of suspension. MCL 257.319(7); MSA 9.2019(7).

D. Issues*

*See Section 2.3 for special notice requirements when a minor is charged with a violation of this statute.

MCL 436.1703(2); MSA ___.___, makes it a misdemeanor to furnish to a minor, or for a minor to use, fraudulent identification to purchase alcoholic liquor. Persons convicted under this subsection may be imprisoned for not more than 93 days, fined not more than $100.00, or both.

"(5) A peace officer who has reasonable cause to believe a minor has consumed alcoholic liquor may require the person to submit to a preliminary chemical breath analysis. A peace officer may arrest a person based in whole or in part upon the results of a preliminary chemical breath analysis. The results of a preliminary chemical breath analysis or other acceptable blood alcohol test are admissible in a criminal prosecution to determine whether the minor has consumed or possessed alcoholic liquor. A minor who refuses to submit to a preliminary chemical breath test analysis as required in this

subsection is responsible for a state civil infraction and may be ordered to pay a civil fine of not more than $100.00." MCL 436.1703(5); MSA ___.___.

For the requirements for ordering substance abuse screening and assessment, see MCL 436.1703(3); MSA ___.___.

9.6 Unlawful Use Of An Automobile, Without Intent To Steal

A. Statute

"Any person who takes or uses without authority any motor vehicle without intent to steal the same, or who shall be a party to such unauthorized taking or using, shall upon conviction thereof be guilty of a misdemeanor, punishable by imprisonment in the state prison for not more than 2 years or by a fine or [of] not more than 1,000 dollars: Provided, That in case of first offense the court may in its discretion reduce the punishment to imprisonment in the county jail for a term of not more than 3 months or a fine of not more than 100 dollars: Provided further, That the provisions of this section shall be construed to apply to any person or persons employed by the owner of said motor vehicle or any one else, who, by the nature of his employment, shall have the charge of or the authority to drive said motor vehicle if said motor vehicle is driven or used without the owner's knowledge or consent."

MCL 750.414; MSA 28.646.

B. Elements

CJI2d 24.2 states:

"(2) First, that the vehicle belonged to someone else.

"(3) Second, that the defendant used the vehicle.

"(4) Third, that the defendant did this without authority.

"(5) Fourth, that the defendant intended to use the vehicle, knowing that [he / she] did not have authority to do so.

"[(6) Anyone who assists in using a vehicle is also guilty of this crime if (he / she) gave the assistance knowing that the person who was taking or using it did not have the authority to do so.]"

C. Licensing Sanctions

1. 2 points. The conviction is reported to the Secretary of State. The Secretary of State has interpreted "[a]ll other moving violations to include this offense. MCL 257.320a(1)(n); MSA 9.2020(1)(1)(n).

A conviction for the attempted offense receives the same number of points. MCL 257.204b; MSA 9.1904(2).

2. If the defendant has no prior convictions for this offense within the preceding seven years, the Secretary of State must suspend the defendant's driver's license for 90 days. If the defendant has one or more convictions for the offense within seven years, the Secretary of State must suspend the defendant's driver's license for one year. MCL 257.319(6); MSA 9.2019(6).

D. Issues

The defendant must have intended to take or use the vehicle, knowing that he had no authority to do so; no intent is required beyond the intent to do the physical act itself. It is a general intent crime. Voluntary intoxication is not available as a defense. *People v Laur*, 128 Mich App 453 (1983).

*See Section 9.9, below.

Unlawful Driving Away an Automobile is a felony. MCL 750.413; MSA 28.645.*

"The distinction between the two offenses is that [the felony offense] requires the defendant to take possession of the motor vehicle without the owner's permission, while the misdemeanor offense of unlawful use of a motor vehicle is committed when an individual, who has been given lawful possession of a motor vehicle, uses it beyond the authority which has been granted to him by the owner." *People v Hayward*, 127 Mich App 50, 61 (1983). See also CJI2d 24.4.

To clear up some confusion, joyriding is a term used to describe the felony offense, not the misdemeanor offense. Michigan case law makes this quite clear by referring to MCL 750.413; MSA 28.645 as "the 'joyriding' statute" and "a felony commonly known as 'joyriding.'" *People v Lerma*, 66 Mich App 566, 570 (1976), and *People v Hayward*, 127 Mich App 50, 61 (1983).

"The term 'motor vehicle' as used in [the Penal Code] shall include all vehicles impelled on the public highways of this state by mechanical power, except traction engines, road rollers and such vehicles as run only upon rails or tracks." MCL 750.412; MSA 28.644.

9.7 Invalid or No Registration Plate

A. Statute

"(1). . . [A] person shall not operate, nor shall an owner knowingly permit to be operated, upon any highway, a vehicle required to be registered under this act unless there is attached to and displayed on the vehicle, as required by this chapter, a valid registration plate issued for the vehicle by the department for the current registration year . . . ."

"(2). . . [A] person who violates subsection (1) is guilty of a misdemeanor, punishable by imprisonment for not more than 90 days, or by a fine of not more than $100.00, or both . . . ."

MCL 257.255; MSA 9.1955.

B. Elements

1. Defendant operated a vehicle on a highway, *or*

2. Defendant-owner permitted another person to operate his or her vehicle on a highway;

3. The vehicle was required to be registered with the Secretary of State; and

4. The vehicle did not have a valid registration plate attached to and displayed on the vehicle for the current year.

C. Licensing Sanctions

No licensing sanctions are imposed for this offense.

D. Issues

If the owner of a registered vehicle transfers or assigns the title or interest in the vehicle, the registration plate issued for the vehicle shall be removed. The plates may be transferred to certain members of the owner's family or retained by the owner for transfer to another vehicle. However, the transferee must apply for a new registration certificate using the old registration certificate or certificate of title to show evidence of the transfer. A person who fails or neglects to transfer registration plates when required to do so is guilty of a misdemeanor. MCL 257.233; MSA 9.1933.

See also MCL 257.256; MSA 9.1956 (unlawful lending or use of title, registration certificate, plate, or permit), and MCL 257.215; MSA 9.1915 (operating an unregistered vehicle).

9.8 Driving While License Suspended or Revoked

A. Statute

"(1) A person whose operator's or chauffeur's license or registration certificate has been suspended or revoked and who has been notified as provided in section 212 of that suspension or revocation, whose application for license has been denied, or who has never applied for a license, shall not operate a motor vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of motor vehicles, within this state.

. . . .

"(3) Except as otherwise provided in this section, a person who violates subsection (1) . . . is guilty of a misdemeanor punishable as follows:

"(a) For a first violation, by imprisonment for not more than 93 days or a fine of not more than $500.00, or both. . . .

"(b) For a violation that occurs after a prior conviction, by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both. . . ."

B. Elements

1. The defendant was subject to one of the following restrictions:

   a. The defendant's operator's or chauffeur's license or registration certificate was suspended or revoked, and the defendant had been notified of this in accordance with MCL 257.212; MSA 9.1912; or,

   b. The defendant's application for a license was denied; or,

   c. The defendant never applied for a license.

2. The defendant operated a motor vehicle on a Michigan highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for parking.

C. Licensing and Vehicle Sanctions

A person who violates §904(1) is subject to the following licensing sanctions, regardless of whether the violation is a first-time or repeat offense:

- **F** If the violation occurs during a suspension of definite length or if the violation occurs before the person is approved for a license following revocation, the Secretary of State shall immediately impose an additional like period of suspension or revocation. MCL 257.904(10); MSA 9.2604(10).
- **F** If the violation occurs while the license is indefinitely suspended or after denial of an application for a license, the Secretary of State shall immediately impose a 30 day suspension or denial. MCL 257.904(11); MSA 9.2604(11).

If the Secretary of State receives records of more than one conviction or civil infraction determination resulting from the same incident, all of the convictions or civil infraction determinations shall be treated as a single violation for purposes of imposing an additional period of suspension or revocation under the foregoing provisions. MCL 257.904(13); MSA 9.2604(13).

Periods of suspension or revocation imposed under MCL 257.904(10) or (11); MSA 9.2604(10) or (11), do not apply to persons who have only one currently effective suspension or denial on their driving records under §321a* and were convicted of or received a civil infraction determination for a violation that occurred during that suspension or denial. This exemption may only be applied once during a person's lifetime. MCL 257.904(18); MSA 9.2604(18).

*MCL 257.321a; MSA 9.2021(1), concerns failures to answer a citation or notice to appear in court and failures to comply with an order or judgment. See Section 2.8.

The Vehicle Code makes no provision for immobilization or forfeiture for first-time violations under §904(1). See MCL 257.904(17); MSA 9.2604(17). However, first offenders may be subject to vehicle impoundment for up to 120 days from the date of judgment under MCL 257.904b(2); MSA 9.2604(2)(2).

Offenders with a second or subsequent suspension or revocation under §904 within seven years receive the following sanctions:

- Second suspension, revocation, or denial within seven years: Immobilization for a maximum of 180 days, in the court's discretion. MCL 257.904d(2)(a); MSA 9.2604(4)(2)(a). The court may also order impoundment for up to 120 days from the date of judgment under MCL 257.904b(2); MSA 9.2604(2)(2).
- Third or fourth suspension, revocation, or denial within seven years: Mandatory immobilization for 90 to 180 days. MCL 257.904d(2)(c); MSA 9.2604(4)(2)(c).
- Fifth (or subsequent) suspension, revocation, or denial within seven years: Mandatory immobilization for no less than one and no more than three years. MCL 257.904d(2)(d); MSA 9.2604(4)(2)(d).

Registration Denial: In addition to the foregoing vehicle sanctions, offenders who have a fourth or subsequent suspension or revocation are subject to mandatory vehicle registration denial under MCL 257.219(1)(d), (2)(d); MSA 9.1919(1)(d), (2)(d).*

*Registration denial provisions take effect June 1, 2000.

Cancellation of Registration Plates: Upon receiving notice from the police of a §904(1) violation, the Secretary of State shall cancel the vehicle registration plates. MCL 257.904(3); MSA 9.2604(3). This sanction is subject to the following exceptions:

- For a first violation, the vehicle was stolen or used with the permission of a person who did not knowingly permit an unlicensed driver to operate the vehicle.
- For a violation occurring after a prior conviction, the vehicle was stolen.

D. Issues

For purposes of §904, a person who never applied for a license includes a person who applied for a license, was denied, and never applied again. MCL 257.904(19); MSA 9.2604(19).

Felonies

9.9 Unlawful Driving Away An Automobile

A. Statute

"Any person who shall, wilfully and without authority, take possession of and drive or take away, and any person who shall assist in or be a party to such taking possession, driving or taking away of any motor vehicle, belonging to another, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 5 years."

MCL 750.413; MSA 28.645.

B. Elements

"(2) First, that the vehicle belonged to someone else.

"(3) Second, that the defendant took possession of the vehicle and [drove / took] it away.

"(4) Third, that these acts were both done [without authority / without the owner's permission].

"(5) Fourth, that the defendant intended to take possession of the vehicle and [drive / take] it away. It does not matter whether the defendant intended to keep the vehicle."

CJI2d 24.1(2)–(5).

C. Licensing Sanctions

1. 6 points. The conviction is reported to the Secretary of State. MCL 257.320a(1)(a); MSA 9.2020(1)(1)(a).

A conviction of attempted UDAA receives the same number of points. MCL 257.204b; MSA 9.1904(2).

2. Suspension of defendant's license is mandatory under statute for a period of one year. MCL 257.319(2)(b); MSA 9.2019(2)(b).

A conviction for the attempted offense receives the same suspension. MCL 257.204b; MSA 9.1904(2).

3. Revocation of defendant's license by the Secretary of State occurs when defendant has 2 or more convictions of a "felony in which a motor vehicle was used" within 7 years. MCL 257.303(2)(b); MSA 9.2003(2)(b).

D. Issues*

*See also Section 7.4 (setting aside adjudications of UDAA) and Miller, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings* (MJI, 1998), Section 4.10 (fingerprinting of juveniles charged with "reportable offenses").

"[A]ny person who shall assist in or be a party to such" a crime shall also be guilty of a felony. MCL 750.413; MSA 28.645. See also CJI2d 24.1(6).

"[A] specific intent to take possession unlawfully of the vehicle is a necessary ingredient of the [felony offense]. . . . The intent to do only the required physical act . . . the taking or driving away of the motor vehicle without authority . . . would therefore be insufficient." *People v Lerma*, 66 Mich App 566, 570, 571 (1976).

"[U]nlawful driving away an automobile does not require proof of an intent to permanently deprive the owner of his property and is therefore not larceny. . . . In cases involving the taking of an automobile, the prosecution will often charge unlawfully driving away a motor vehicle in lieu of larceny so as to dispense with the need to prove 'intent to steal.'" *People v Goodchild*, 68 Mich App 226, 233 (1976).

The issue of whether a vehicle is a "motor vehicle" is a question of law to be decided by the court. *People v Shipp*, 68 Mich App 452, 454–55 (1976) (a motorcycle found to be a "motor vehicle"). See MCL 750.412; MSA 28.644 (definition of "motor vehicle").

"The term 'motor vehicle' as used in [the Penal Code] shall include all vehicles impelled on the public highways of this state by mechanical power, except traction engines, road rollers and such vehicles as run only upon rails or tracks." MCL 750.412; MSA 28.644.

Unlawful Use of an Automobile, Without Intent to Steal is a 2-year misdemeanor. MCL 750.414; MSA 28.646.*

*See Section 9.6, above.

"The distinction between the two offenses is that [the felony offense] requires the defendant to take possession of the motor vehicle without the owner's permission, while the [2-year] misdemeanor offense of unlawful use of a motor vehicle is committed when an individual, who has been given lawful possession of a motor vehicle, uses it beyond the authority which has been granted to him by the owner." *People v Hayward*, 127 Mich App 50, 61 (1983). See also CJI2d 24.4.

To clear up some confusion, joyriding is a term used to describe the felony offense, not the misdemeanor offense. Michigan case law makes this quite clear by referring to MCL 750.413; MSA 28.645 as: "the 'joyriding' statute" and "a felony commonly known as 'joyriding.'" *People v Lerma*, 66 Mich App 566, 570 (1976), and *People v Hayward*, 127 Mich App 50, 61 (1983).

9.10 Failing To Stop At Signal Of Police Officer ("Fleeing and Eluding")

A substantially similar statute appears in both the Michigan Vehicle Code and the Michigan Penal Code. MCL 257.602a; MSA 9.2302(1), and MCL 750.479a; MSA 28.747(1). Differences in the two statutes are noted below.

Note that the statute in the Michigan Vehicle Code refers exclusively to the operation of vehicles on the highways. MCL 257.601; MSA 9.2301.

A. Statutes

Subsections (1)–(5) of both statutes are the same. They are as follows:

"(1) A driver of a motor vehicle who is given by hand, voice, emergency light, or siren a visual or audible signal by a police or conservation officer, acting in the lawful performance of his or her duty, directing the driver to bring his or her motor vehicle to a stop shall not willfully fail to obey that direction by increasing the speed of the motor vehicle, extinguishing the lights of the motor vehicle, or otherwise attempting to flee or elude the officer. This subsection does not apply unless the police or conservation officer giving the signal is in uniform and officer's the vehicle is identified as an official police or department of natural resources vehicle."

"(2) Except as provided in subsection (3), (4), or (5), an individual who violates subsection (1) is guilty of fourth-degree fleeing and eluding, a felony punishable by imprisonment for not more than 2 years or a fine of not more than $500.00, or both.

"(3) Except as provided in subsection (4) or (5), an individual who violates subsection (1) is guilty of third-degree fleeing and eluding, a felony punishable by imprisonment for not more than 5 years or a fine of not more than $1,000.00, or both, if 1 or more of the following circumstances apply:

"(a) The violation results in a collision or accident.

"(b) A portion of the violation occurred in an area where the speed limit is 35 miles an hour or less, whether that speed limit is posted or imposed as a matter of law.

"(c) The individual has a prior conviction for fourth-degree fleeing and eluding, attempted fourth-degree fleeing and eluding, or fleeing and eluding under a current or former law of this state prohibiting substantially similar conduct.

"(4) Except as provided in subsection (5), an individual who violates subsection (1) is guilty of second-degree fleeing and eluding, a felony punishable by imprisonment for not more than 10 years or a fine of not more than $5,000.00, or both, if 1 or more of the following circumstances apply:

"(a) The violation results in serious injury to an individual.

"(b) The individual has 1 or more prior convictions for first-, second-, or third-degree fleeing and eluding, attempted first-, second-, or third-degree fleeing and eluding, or fleeing and eluding under a current or former law of this state prohibiting substantially similar conduct.

"(c) The individual has any combination of 2 or more prior convictions for fourth-degree fleeing and eluding, attempted fourth-degree fleeing and

eluding, or fleeing and eluding under a current or former law of this state prohibiting substantially similar conduct.

"(5) If the violation results in the death of another individual, an individual who violates subsection (1) is guilty of first-degree fleeing and eluding, a felony punishable by imprisonment for not more than 15 years or a fine of not more than $10,000.00, or both.

MCL 257.602a(1)–(5); MSA 9.2302(1)(1)–(5), and MCL 750.479a(1)–(5); MSA 28.747(1)(1)–(5).

Both statutes define "serious injury" in the same manner:

"As used in this section, 'serious injury' means a physical injury that is not necessarily permanent, but that constitutes serious bodily disfigurement or that seriously impairs the functioning of a body organ or limb. Serious injury includes, but is not limited to, 1 or more of the following:

"(a) Loss of a limb or use of a limb.

"(b) Loss of a hand, foot, finger, or thumb or use of a hand, foot, finger, or thumb.

"(c) Loss of an eye or ear or use of an eye or ear.

"(d) Loss or substantial impairment of a bodily function.

"(e) Serious visible disfigurement.

"(f) A comatose state that lasts for more than 3 days.

"(g) Measurable brain damage or mental impairment.

"(h) A skull fracture or other serious bone fracture.

"(i) Subdural hemorrhage or hematoma."

MCL 257.602a(7); MSA 9.2302(1)(7), and MCL 750.479a(10); MSA 28.747(1)(10).

B. Elements

The elements of **fourth-degree fleeing and eluding** are:

1. The officer was in uniform and was performing his regular police duties. [And if the officer was in a police vehicle at night, the vehicle was adequately marked as a police vehicle.]
2. The defendant was driving a motor vehicle.
3. The police officer ordered the defendant to stop the vehicle.
4. The defendant knew of the order.

5. The defendant refused to obey the order by trying to flee or avoid being caught.

CJI2d 13.6.

The elements of **third-degree fleeing and eluding** are:

1. The elements of fourth-degree fleeing and eluding, and one of the following:

- **F** the violation resulted in a collision or accident, or
- **F** any portion of the violation occurred in an area where the speed limit was 35 miles per hour or less. The speed limit may be posted or imposed as a matter of law, or
- **F** the defendant has been previously convicted of fourth-degree fleeing and eluding, attempted fourth-degree fleeing and eluding, or fleeing and eluding under a current or former Michigan law prohibiting substantially similar conduct.

The elements of **second-degree fleeing and eluding** are:

1. The elements of fourth-degree fleeing and eluding, and one of the following:

- **F** the violation resulted in serious injury to an individual, or
- **F** the defendant has one or more previous convictions for first-, second-, or third-degree fleeing and eluding, attempted first-, second-, or third-degree fleeing and eluding, or fleeing and eluding under a current or former Michigan law prohibiting substantially similar conduct, or
- **F** the defendant has two or more previous convictions of any combination of the following offenses: fourth-degree fleeing and eluding, attempted fourth-degree fleeing and eluding, or fleeing and eluding under a current or former Michigan law prohibiting substantially similar conduct.

The elements of **first-degree fleeing and eluding** are:

1. The elements of fourth-degree fleeing and eluding, and
2. The violation resulted in the death of another person.

C. Licensing Sanctions

1. 6 points. The conviction is reported to the Secretary of State. MCL 257.320a(1)(g); MSA 9.2020(1)(1)(g).

A conviction of the attempted offense receives the same number of points. MCL 257.204b; MSA 9.1904(2).

2. Following convictions of fourth- or third-degree fleeing and eluding, suspension of defendant's license is mandatory under statute for a period of 1

year. MCL 257.319(2)(f); MSA 2019(2)(f), and MCL 750.479a(7); MSA 28.747(1)(7).

If the defendant is convicted of violating MCL 257.602a; MSA 9.2302(1), the defendant shall not be eligible to receive a restricted license during the first 6 months of the period of suspension.

A conviction of the attempted offense receives the same suspension. MCL 257.204b; MSA 9.1904(2).

3. Following convictions of second- or first-degree fleeing and eluding, the Secretary of State shall revoke the defendant's driver's license. MCL 257.303(2)(g); MSA 9.2003(2)(g), and MCL 750.479a(8); MSA 28.747(1)(8).

D. Issues

Neither statute is limited to prohibiting only high-speed or long-distance "police chases." The Court of Appeals found sufficient evidence to bind over the defendant for trial, where, after the police officer signalled for defendant to stop, defendant sped up slightly, made two turns, stopped the car, and attempted to flee on foot. A defendant's intent to flee or elude a police officer may be inferred from his or her acceleration after the officer signals the defendant to stop. *People v Grayer*, __ Mich App __ (June 4, 1999).

A person may be convicted under either MCL 257.602a(2)–(5); MSA 9.2302(1)(2)–(5), and MCL 750.479a(2)–(5); MSA 28.747(1)(2)–(5), but not both, for conduct arising out of the same transaction. MCL 257.602a(6); MSA 9.2302(1)(6), and MCL 750.479a(9); MSA 28.747(1)(9).

MCL 750.479a(6); MSA 28.747(1)(6), contains a separate offense, assaulting a police officer making a lawful arrest:

"An individual who forcibly assaults or commits a bodily injury requiring medical care or attention upon a peace or police officer of this state while the peace or police officer is engaged in making a lawful arrest, knowing him or her to be a peace or police officer, is guilty of a misdemeanor, punished by a fine of not more than $1,000.00, or by imprisonment for not more than 2 years, or both."

The crime of assaulting a police officer making a lawful arrest requires that the prosecution prove:

1. that the defendant used force to injure a police officer,
2. that the injury required medical care,
3. that at the time the defendant intended to injure the officer,
4. that the defendant knew that the person he was attacking was a police officer, and
5. that the officer was making a legal arrest.

CJI2d 13.4. Although the statute prohibits a forcible assault *or* a bodily injury, the Court of Appeals has interpreted the statute to require both a forcible assault and bodily injury requiring medical care or attention. *People v Engleberg,* 26 Mich App 309, 313 (1970). The lawfulness of the arrest, as an element of the offense, must be decided by the jury, not the court. *Id.* and CJI2d 13.5. See also *State Farm Fire & Casualty Company v Moss,* 182 Mich App 559, 562 (1989).

Disobeying Direction of Police Officer is a misdemeanor; the sanctions for this offense do not include suspension of license. MCL 257.602; MSA 9.2302.

"Drunk Driving" Offenses

9.11 Section 625(1) Offenses—OUIL, OUID, UBAL

The section addresses the three drunk driving offenses contained in MCL 257.625(1); MSA 9.2325(1), all of which are subject to the same penalties. These are:

- **F** Operating a motor vehicle under the influence of intoxicating liquor (OUIL).
- **F** Operating a motor vehicle under the influence of a controlled substance (OUID).
- **F** Operating a motor vehicle with an unlawful bodily alcohol level (UBAL).

A. Statute

"(1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if either of the following applies:

"(a) The person is under the influence of intoxicating liquor, a controlled substance, or a combination of intoxicating liquor and a controlled substance.

"(b) The person has an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

. . . .

"(8) If a person is convicted of violating subsection (1), all of the following apply:

"(a) Except as otherwise provided in subdivisions (b) and (c), the person is guilty of a misdemeanor punishable by 1 or more of the following:

"(i) Community service for not more than 45 days.

"(ii) Imprisonment for not more than 93 days.

"(iii) A fine of not less than $100.00 or more than $500.00.

"(b) If the violation occurs within 7 years of a prior conviction, the person shall be sentenced to pay a fine of not less than $200.00 or more than $1,000.00 and 1 or more of the following:

"(i) Imprisonment for not less than 5 days or more than 1 year. . . .

"(ii) Community service for not less than 30 days or more than 90 days.

"(v) If the violation occurs within 10 years of 2 or more prior convictions, the person is guilty of a felony and shall be sentenced to pay a fine of not less than $500.00 or more than $5,000.00 and to either of the following:

"(i) Imprisonment under the jurisdiction of the department of corrections for not less than 1 year or more than 5 years.

"(ii) Probation with imprisonment in the county jail for not less than 30 days or more than 1 year and community service for not less than 60 days or more than 180 days. . . ."

MCL 257.625(1) and (8)(a)–(c); MSA 9.2325(1) and (8)(a)–(c).

B. Elements

The following criminal jury instructions may be used in cases involving these offenses:

CJI2d 15.1 OUIL/UBAL Violation

CJI2d 15.2 Elements Common to OUIL, UBAL, and OWI

CJI2d 15.3 Specific Elements of OUIL/UBAL

CJI2d 15.4 Specific Elements of OWI

CJI2d 15.5 Factors in Considering OUIL, UBAL, and OWI*

CJI2d 15.6 Possible Verdicts

CJI2d 15.7 Verdict Form

CJI2d 15.9 Defendant's Decision to Forgo Chemical Testing

*The Court of Appeals has criticized CJI2d 15.5 in *People v Calvin*, 216 Mich App 403, 411 n2 (1996).

1. Operating a Motor Vehicle Under the Influence of Intoxicating Liquor and/or a Controlled Substance (OUIL, OUID)—Elements of the Offense

1. Defendant operated a motor vehicle on a Michigan highway, or other place open to the general public or generally accessible to motor vehicles, including an area designated for parking.

2. At the time defendant operated the motor vehicle, defendant was under the influence of intoxicating liquor, a controlled substance, or a combination of intoxicating liquor and a controlled substance.

3. As a result, defendant was substantially deprived of normal control or clarity of mind.*

*This element was set forth by the Court of Appeals in *People v Raisanen*, 114 Mich App 840, 844 (1982).

4. Defendant was no longer able to operate a vehicle in a normal manner.

2. Operating a Motor Vehicle with an Unlawful Bodily Alcohol Level (UBAL)—Elements of the Offense

1. Defendant operated a motor vehicle on a Michigan highway, or other place open to the general public or generally accessible to motor vehicles, including an area designated for parking.

2. At the time of operating the motor vehicle, defendant had an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

C. Licensing and Vehicle Sanctions

1. First-time Offenders

If the offender has no prior convictions within seven years, the Secretary of State shall suspend his or her license for 180 days. After the first 30 days of the suspension have elapsed, the Secretary of State may issue the offender a restricted license during all or a specified portion of the suspension, if the person is otherwise eligible for a license. MCL 257.319(8)(a), (12); MSA 9.2019(8)(a), (12).

The Secretary of State will assess six points for a violation of §625(1) or a local ordinance substantially corresponding to it. MCL 257.320a(1)(b); MSA 9.2020(1)(1)(b).

Upon conviction of a violation of §625(1) (or a local ordinance that substantially corresponds with it), the court may order vehicle immobilization for not more than 180 days. MCL 257.904d(1)(a); MSA 9.2604(4)(1)(a) and MCL 257.625(8)(e); MSA 9.2325(8)(e).

2. Offenders Who Violate §625(1) Within Seven Years of a Prior Conviction

Under MCL 257.303(2)(c), (4); MSA 9.2003(2)(c), (4), offenders convicted of violating §625(1) within seven years of another prior conviction listed in the statute will be subject to mandatory driver's license revocation for a minimum of one year. The Secretary of State must revoke the licenses of §625(1) offenders who have one prior conviction of any the following violations or attempted violations:

- OUIL, OUID, or UBAL under §625(1).
- OWI, under §625(3).
- OUIL, OUID, UBAL, or OWI causing death of another under §625(4)
- OUIL, OUID, UBAL, or OWI causing serious impairment of a body function of another, under §625(5).
- Being under 21 years of age and operating a vehicle with any bodily alcohol content, under §625(6) ("zero tolerance"). (Only one zero tolerance violation may be considered for purposes of license revocation under the statute.)
- Child endangerment, under §625(7).
- Operating a commercial motor vehicle with an unlawful bodily alcohol level, under §625m.
- Former §625(1) or (2) or former §625b. Former §625(1) provided criminal penalties for OUIL and OUID. Former §625(2) prohibited driving with a blood alcohol content of 0.10 percent or more. Former §625b provided criminal penalties for OWI.
- Operating with license suspended or revoked and causing death of another under §904(4).
- Operating with license suspended or revoked and causing serious impairment of a body function of another under §904(5).
- Negligent homicide, manslaughter, or murder resulting from the operation of a vehicle or an attempt to commit any of those crimes.

For a conviction under §625(1) within seven years after a prior conviction, the court shall order vehicle immobilization for not less than 90 days or more than 180 days, unless forfeiture is ordered. MCL 257.904d(1)(c); MSA 9.2604(4)(1)(c). Forfeiture may be ordered in the court's discretion if the offender has an ownership interest in the vehicle used in the offense. The court may order that a leased vehicle be returned to the lessor. MCL 257.625n; MSA 9.2325(14).

3. Offenders Who Violate §625(1) Within Ten Years of Two or More Prior Convictions

Under MCL 257.303(2)(f), (4); MSA 9.2003(2)(f), (4), offenders convicted of violating §625(1) within ten years of two other prior convictions listed in the statute will be subject to mandatory driver's license revocation for a minimum of five years. The Secretary of State must revoke the licenses of §625(1)

offenders who have two prior convictions of the following violations or attempted violations, if the convictions resulted from arrest on or after January 1, 1992:

- OUIL, OUID, or UBAL under §625(1).
- OWI, under §625(3).
- OUIL, OUID, UBAL, or OWI causing death of another under §625(4)
- OUIL, OUID, UBAL, or OWI causing serious impairment of a body function of another, under §625(5).
- Being under 21 years of age and operating a vehicle with any bodily alcohol content, under §625(6) ("zero tolerance"). (Only one zero tolerance violation may be considered for purposes of license revocation under the statute.)
- Child endangerment, under §625(7).
- Operating a commercial motor vehicle with an unlawful bodily alcohol level, under §625m.
- Former §625(1) or (2) or former §625b. Former §625(1) provided criminal penalties for OUIL and OUID. Former §625(2) prohibited driving with a blood alcohol content of 0.10 percent or more. Former §625b provided criminal penalties for OWI.
- Operating with license suspended or revoked and causing death of another under §904(4).
- Operating with license suspended or revoked and causing serious impairment of a body function of another under §904(5).
- Negligent homicide, manslaughter, or murder resulting from the operation of a vehicle or an attempt to commit any of those crimes.

For a conviction under §625(1) within ten years after two or more prior convictions, the court shall order vehicle immobilization for not less than 1 year or more than 3 years, unless the vehicle is forfeited. MCL 257.904d(1)(d); MSA 9.2604(4)(1)(d). Forfeiture may be ordered in the court's discretion if the offender has an ownership interest in the vehicle used in the offense. The court may order that a leased vehicle be returned to the lessor. MCL 257.625n; MSA 9.2325(14).

D. Issues

It is not necessary for a defendant to possess a driver's license in order to be convicted of OUIL, OUID, or UBAL. MCL 257.625(1) MSA 9.2325(1).

Persons charged with, and convicted of, operating a motor vehicle under the influence of a controlled substance are treated and sentenced just the same as persons who are charged with operating a motor vehicle under the influence of alcohol. MCL 257.625(1)(a); MSA 9.2324(1)(a). In *People v Prehn*, 153 Mich App 532 (1986), the Court of Appeals addressed a situation where a defendant had ingested a combination of alcohol and a prescription drug. The information filed in *Prehn* stated only that the defendant had driven under the influence of alcohol; however, the trial court gave the following instruction in

response to a question from the jury about the interaction of the drug with alcohol:

> "The defendant...can only be convicted of [OUIL] if it is proved beyond a reasonable doubt that he was under the influence of intoxicating liquor at the time he was operating a motor vehicle. He is not charged with driving while under the influence of prescription drugs...and...cannot be convicted if he was intoxicated, and his intoxication was solely caused by his consumption of drugs or medication.
>
> "If, however, it is proven beyond a reasonable doubt that the defendant was intoxicated while driving the motor vehicle...and that such intoxication was due to the combined effect of prescription drugs...then the defendant may be convicted of driving under the influence of intoxicating liquor, even though the amount of intoxicating liquor consumed would not alone, absent the effect of the prescription drugs...have rendered him intoxicated to the extent described in the [previous] jury instructions I have given you defining this offense." 153 Mich App at 533-534.

The Court of Appeals disagreed with the defendant's assertion on appeal that the foregoing instruction amounted to an amendment of the information to include a new offense (i.e., OUID). The panel found that the jury could properly consider the effect of the prescription drug on the defendant's susceptibility to alcohol, just as it could consider the defendant's weight in determining whether the amount of alcohol he had consumed was sufficient to render him intoxicated. "The [trial court's] instruction merely clarified for the jury one of the factors which might be of relevance in determining defendant's guilt of the charged offense." 153 Mich App at 535.

"Under the influence" is defined in CJI2d 15.2 as follows:

> "'Under the influence of alcohol' means that because of drinking alcohol, the defendant's ability to operate a motor vehicle in a normal manner was substantially lessened. To be under the influence, a person does not have to be what is called 'dead drunk,' that is, falling down or hardly able to stand up. On the other hand, just because a person has drunk alcohol or smells of alcohol does not prove, by itself, that the person is under the influence of alcohol. The test is whether, because of drinking alcohol, the defendant's mental or physical condition was significantly affected and the defendant was no longer able to operate a vehicle in a normal manner."

It will be presumed that the defendant was operating a vehicle under the influence of intoxicating liquor if there was at the time alleged 0.10 grams or more of alcohol per 100 milliliters of the defendant's blood, per 210 liters of breath, or per 67 milliliters of urine. MCL 257.625a(9)(c); MSA 9.2325(1)(9)(c).

In *People v Walters*, 160 Mich App 396, 403 (1987), the defendant Walters was charged with OUIL and convicted by a jury of the lesser included offense of driving while impaired. A police officer testified that he saw Walters drive about 30 feet along the road, stop, and back into a driveway. The officer said he did not notice anything abnormal about Walters's driving; however, Walters smelled of alcohol, his eyes were glazed and bloodshot, and he swayed slightly on his feet. On appeal from his conviction, Walters asserted that he could not be convicted of OUIL or driving while impaired when the officer saw him driving normally. The Court of Appeals affirmed the conviction, holding that the circumstantial evidence presented was sufficient to establish that Walters was unable to drive normally. In so holding, the panel noted that "this case probably represents the low-water mark in the amount of evidence necessary to allow the submission of an OUIL charge to a jury. We do point out, however, that we have no difficulty in the submission of the DWI charge to the jury. The circumstantial evidence was clearly strong enough to allow the jury to consider a DWI charge." 160 Mich App at 405.

MCL 257.625(1)(b); MSA 9.2325(1)(b) creates a per se misdemeanor offense permitting convicted based solely on the defendant's bodily alcohol level, without regard to whether alcohol affected the defendant's ability to operate the vehicle. See *People v Calvin*, 216 Mich App 403, 407 (1996). UBAL is an alternative charge to OUIL. The prosecutor may charge both OUIL and UBAL as alternative theories, but the defendant can be convicted of only one of these offenses. Accordingly, the prosecutor should proceed on a single count complaint alleging alternative theories for conviction. *People v Nicolaides*, 148 Mich App 100, 103 (1985).

9.12 Operating While Visibly Impaired (OWI)—§625(3)

This section addresses the elements of and sanctions for offenses under §625(3), operating a vehicle while visibly impaired ("OWI"). OWI is a lesser offense of OUIL/OUID and UBAL, so that a defendant charged with OUIL, OUID, or UBAL may be found guilty of OWI. MCL 257.625(3); MSA 9.2325(3).

A. Statute

"(3) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state when, due to the consumption of intoxicating liquor, a controlled substance, or a combination of intoxicating liquor and a controlled substance, the person's ability to operate the vehicle is visibly impaired. . . ."

. . . .

"(10) If a person is convicted of violating subsection (3), all of the following apply:

"(a) Except as otherwise provided in subdivisions (b) and (c), the person is guilty of a misdemeanor punishable by 1 or more of the following:

"(i) Community service for not more than 45 days.

"(ii) Imprisonment for not more than 93 days.

"(iii) A fine of not more than $300.00.

"(b) If the violation occurs within 7 years of 1 prior conviction, the person shall be sentenced to pay a fine of not less than $200.00 or more than $1,000.00, and 1 or more of the following:

"(i) Imprisonment for not less than 5 days or more than 1 year. . . .

"(ii) Community service for not less than 30 days or more than 90 days.

"(v) If the violation occurs within 10 years of 2 or more prior convictions, the person is guilty of a felony and shall be sentenced to pay a fine of not less than $500.00 or more than $5,000.00 and to either of the following:

"(i) Imprisonment under the jurisdiction of the department of corrections for not less than 1 year or more than 5 years.

"(ii) Probation with imprisonment in the county jail for not less than 30 days or more than 1 year and community service for not less than 60 days or more than 180 days. . . ."

MCL 257.625(3) and (10)(a)–(c); MSA 9.2325(3) and (10)(a)–(c).

B. Elements

The following criminal jury instructions may be used in OWI cases:

CJI2d 15.2 Elements Common to OUIL, UBAL, and OWI

CJI2d 15.4 Specific Elements of OWI

CJI2d 15.5 Factors in Considering OUIL, UBAL, and OWI*

CJI2d 15.6 Possible Verdicts

CJI2d 15.7 Verdict Form

CJI2d 15.9 Defendant's Decision to Forgo Chemical Testing

*The Court of Appeals has criticized CJI2d 15.5 in *People v Calvin*, 216 Mich App 403, 411 n2 (1996).

The elements of OWI are as follows:

1. Defendant operated a motor vehicle on a Michigan highway or other place open to the general public or generally accessible to motor vehicle, including an area designated for the parking of vehicles.

2. Defendant had consumed intoxicating liquor, a controlled substance, or a combination of intoxicating liquor and a controlled substance.

3. Because of the consumption of intoxicating liquor and/or a controlled substance, defendant's ability to operate the vehicle was visibly impaired.

C. Licensing and Vehicle Sanctions

1. First-time Offenders

If there are no prior convictions within seven years and the offender's impairment was due to alcohol alone, the Secretary of State shall suspend the offender's license for 90 days. The period of suspension is increased to 180 days if the impairment was caused by consumption of a controlled substance or a combination of intoxicating liquor and controlled substance. The offender may be issued a restricted license during all or a specified portion of the suspension, if he or she is otherwise eligible for a license. MCL 257.319(8)(b); MSA 9.2019(8)(b).

The Secretary of State will also assess four points for a violation of §625(3) or a law or local ordinance substantially corresponding to it. MCL 257.320a(1)(f); MSA 9.2020(1)(1)(f).

Upon conviction of a first offense under §625(3) or a local ordinance substantially corresponding to it, the court may in its discretion order vehicle immobilization for not more than 180 days. MCL 257.904d(1)(a); MSA 9.2604(4)(1)(a), MCL 257.625(10)(e); MSA 9.2325(10)(e).

2. Repeat Offenders—Violation Within Seven Years of One Prior Conviction

Under MCL 257.303(2)(c), (4); MSA 9.2003(2)(c), (4), offenders convicted of violating §625(3) within seven years of another prior conviction listed in the statute will be subject to mandatory driver's license revocation for a minimum of one year. The Secretary of State must revoke the licenses of §625(3) offenders who have one prior conviction of any the following violations or attempted violations:

- OUIL, OUID, or UBAL under §625(1).
- OWI, under §625(3).
- OUIL, OUID, UBAL, or OWI causing death of another under §625(4)
- OUIL, OUID, UBAL, or OWI causing serious impairment of a body function of another, under §625(5).
- Being under 21 years of age and operating a vehicle with any bodily alcohol content, under §625(6) ("zero tolerance"). (Only one zero

tolerance violation may be considered for purposes of license revocation under the statute.)

- Child endangerment, under §625(7).
- Operating a commercial motor vehicle with an unlawful bodily alcohol level, under §625m.
- Former §625(1) or (2) or former §625b. Former §625(1) provided criminal penalties for OUIL and OUID. Former §625(2) prohibited driving with a blood alcohol content of 0.10 percent or more. Former §625b provided criminal penalties for OWI.
- Operating with license suspended or revoked and causing death of another under §904(4).
- Operating with license suspended or revoked and causing serious impairment of a body function of another under §904(5).
- Negligent homicide, manslaughter, or murder resulting from the operation of a vehicle or an attempt to commit any of those crimes.

For a conviction under §625(3) within seven years after a prior conviction, the court shall order vehicle immobilization for not less than 90 days or more than 180 days, unless forfeiture is ordered. MCL 257.904d(1)(c); MSA 9.2604(4)(1)(c). Forfeiture may be ordered in the courts' discretion if the offender has an ownership interest in the vehicle used in the offense. The court may order that a leased vehicle be returned to the lessor. MCL 257.625n; MSA 9.2325(14).

3. Repeat Offenders—Violation Within Ten Years of Two or More Prior Convictions

Under MCL 257.303(2)(f), (4); MSA 9.2003(2)(f), (4), offenders convicted of violating §625(3) within ten years of two other prior convictions listed in the statute will be subject to mandatory driver's license revocation for a minimum of five years. The Secretary of State must revoke the licenses of §625(3) offenders who have two prior convictions of the following violations or attempted violations, if the convictions resulted from arrest on or after January 1, 1992:

- OUIL, OUID, or UBAL under §625(1).
- OWI, under §625(3).
- OUIL, OUID, UBAL, or OWI causing death of another under §625(4)
- OUIL, OUID, UBAL, or OWI causing serious impairment of a body function of another, under §625(5).
- Being under 21 years of age and operating a vehicle with any bodily alcohol content, under §625(6) ("zero tolerance"). (Only one zero

tolerance violation may be considered for purposes of license revocation under the statute.)

- **F** Child endangerment, under §625(7).
- **F** Operating a commercial motor vehicle with an unlawful bodily alcohol level, under §625m.
- **F** Former §625(1) or (2) or former §625b. Former §625(1) provided criminal penalties for OUIL and OUID. Former §625(2) prohibited driving with a blood alcohol content of 0.10 percent or more. Former §625b provided criminal penalties for OWI.
- **F** Operating with license suspended or revoked and causing death of another under §904(4).
- **F** Operating with license suspended or revoked and causing serious impairment of a body function of another under §904(5).
- **F** Negligent homicide, manslaughter, or murder resulting from the operation of a vehicle or an attempt to commit any of those crimes.

For a conviction under §625(3) within ten years after two or more prior convictions, the court shall order vehicle immobilization for not less than 1 year or more than 3 years, unless the vehicle is forfeited. MCL 257.904d(1)(d); MSA 9.2604(4)(1)(d). Forfeiture may be ordered in the court's discretion if the offender has an ownership interest in the vehicle used in the offense. The court may order that a leased vehicle be returned to the lessor. MCL 257.625n; MSA 9.2325(14).

Effective June 1, 2000, the Secretary of State shall refuse issuance of a certificate of title, a registration, or a transfer of registration for a vehicle if the driver's license of the vehicle's owner or lessee is suspended, revoked, or denied for a third or subsequent violation of §625 or §625m or a local ordinance substantially corresponding to these sections. MCL 257.219(1)(d), (2)(d); MSA 9.1919(1)(d), (2)(d). This provision also applies to co-owners and co-lessees of the vehicle.

D. Issues

It is not necessary for a defendant to possess a driver's license in order to be convicted of OWI. MCL 257.625(3); MSA 9.2325(3).

In *People v Prehn*, 153 Mich App 532 (1986), the Court of Appeals addressed a situation where a defendant convicted of OWI had ingested a combination of alcohol and a prescription drug. The information filed in *Prehn* stated only that the defendant had driven under the influence of alcohol; however, the trial court gave the following instruction in response to a question from the jury about the interaction of the drug with alcohol:

> "The defendant...can only be convicted of [OUIL] if it is proved beyond a reasonable doubt that he was under the influence of intoxicating liquor at the time he was operating a motor vehicle. He is not charged with driving while under the influence of prescription drugs...and...cannot be convicted if he

> was intoxicated, and his intoxication was solely caused by his consumption of drugs or medication.
>
> "If, however, it is proven beyond a reasonable doubt that the defendant was intoxicated while driving the motor vehicle...and that such intoxication was due to the combined effect of prescription drugs...then the defendant may be convicted of driving under the influence of intoxicating liquor, even though the amount of intoxicating liquor consumed would not alone, absent the effect of the prescription drugs...have rendered him intoxicated to the extent described in the [previous] jury instructions I have given you defining this offense.
>
> "The same principle apples to the lesser included offense of operating a motor vehicle while [impaired]." 153 Mich App at 533-534.

The Court of Appeals disagreed with the defendant's assertion on appeal that the foregoing instruction amounted to an amendment of the information to include a new offense (i.e., OUID). The panel found that the jury could properly consider the effect of the prescription drug on the defendant's susceptibility to alcohol, just as it could consider the defendant's weight in determining whether the amount of alcohol he had consumed was sufficient to render him intoxicated. "The [trial court's] instruction merely clarified for the jury one of the factors which might be of relevance in determining defendant's guilt of the charged offense." 153 Mich App at 535.

The Michigan Supreme Court has defined visible impairment as follows:

> "[The] defendant's ability to drive was so weakened or reduced by consumption of intoxicating liquor that defendant drove with less ability than would an ordinary, careful and prudent driver. Such weakening or reduction of ability to drive must be visible to an ordinary, observant person." *People v Lambert*, 395 Mich 296, 305 (1975), cited in *People v Calvin*, 216 Mich App 403, 407 (1996). See also CJI 2d 15.4.

The degree of a person's intoxication for purposes of §625(3) may be established by chemical analysis tests of the person's blood, breath, or urine, or by testimony of someone who saw the impaired driving. *People v Calvin*, *supra*, 216 Mich App at 407-408.

Impairment of ability to operate a motor vehicle for purposes of §625(3) will be presumed if at the time alleged, there is more than 0.07 grams but less than 0.10 grams of alcohol per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine. MCL 257.625a(9)(b); MSA 9.2325(1)(9)(b). A bodily alcohol level of 0.07 grams or less raises a presumption that the defendant's ability to operate a motor vehicle was not impaired. MCL

257.625a(9)(a); MSA 9.2325(1)(9)(a). These presumptions are rebuttable, as explained in *Calvin, supra*:

> "The presumptions *against* the accused in [§625a(9)(b)] must be construed as permissive or rebuttable to ensure that the burden of proving all elements of the offense beyond a reasonable doubt remains on the prosecution. MRE 302(b). Similarly, the presumption *in favor of* the accused in [§625a(9)(a)] must be construed as permissive, rather than as a conclusive presumption of innocence, because it is not an essential element of the offense of DWI that a person's BAC exceed 0.07 percent....Hence, the validity of a presumption that arises from chemical analysis testing is within the province of the trier of fact to weigh, not in the abstract, but, rather, in connection with all the evidence in the case, and thereafter to accept or reject it....The Legislature clearly contemplated that a person whose BAC was 0.07 percent or less could still be visibly impaired.
>
> "Accordingly, we conclude that [§625a(9)(a)] embodies a permissive or rebuttable presumption that a defendant's ability to operate a motor vehicle is not impaired where chemical analysis of the person's blood, breath, or urine indicates a BAC of 0.07 percent or less." 216 Mich App at 408-410. [Emphasis in original.]

Circumstantial evidence may also be used to establish that a person was driving while visibly impaired. In *People v Walters*, 160 Mich App 396, 403 (1987), the defendant Walters was charged with OUIL and convicted by a jury of the lesser included offense of driving while impaired. A police officer testified that he saw Walters drive about 30 feet along the road, stop, and back into a driveway. The officer said he did not notice anything abnormal about Walters's driving; however, Walters smelled of alcohol, his eyes were glazed and bloodshot, and he swayed slightly on his feet. On appeal from his conviction, Walters asserted that he could not be convicted of OUIL or driving while impaired when the officer saw him driving normally. The Court of Appeals affirmed the conviction, holding that the circumstantial evidence presented was sufficient to establish that Walters was unable to drive normally. In so holding, the panel noted that "this case probably represents the low-water mark in the amount of evidence necessary to allow the submission of an OUIL charge to a jury. We do point out, however, that we have no difficulty in the submission of the DWI charge to the jury. The circumstantial evidence was clearly strong enough to allow the jury to consider a DWI charge." 160 Mich App at 405.

9.13 "Zero Tolerance" Violations—§625(6)

A. Statute

"(6) A person who is less than 21 years of age, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person has any bodily alcohol content. As used in this subsection, 'any bodily alcohol content' means either of the following:

"(a) An alcohol content of not less than 0.02 grams or more than 0.07 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

"(b) Any presence of alcohol within a person's body resulting from the consumption of intoxicating liquor, other than consumption of intoxicating liquor as a part of a generally recognized religious service or ceremony."

. . . .

"(11) If a person is convicted of violating subsection (6), all of the following apply:

"(a) Except as otherwise provided in subdivision (b), the person is guilty of a misdemeanor punishable by 1 or both of the following:

"(i) Community service for not more than 45 days.

"(ii) A fine of not more than $250.00.

"(b) If the violation occurs within 7 years of 1 or more prior convictions, the person may be sentenced to 1 or more of the following:

"(i) Community service for not more than 60 days.

"(ii) A fine of not more than $500.00.

"(iii) Imprisonment for not more than 93 days."

MCL 257.625(6) and (11); MSA 9.2325(6) and (11).

B. Elements

1. The defendant, whether licensed or not, operated a motor vehicle on the date in question.

2. The defendant operated the vehicle on a Michigan highway or other place open to the public or generally accessible to motor vehicles, including a designated parking area.

3. The defendant was less than 21 years of age.

4. The defendant had "any bodily alcohol content."

C. Licensing Sanctions

The discussion below sets forth the criminal penalties and licensing sanctions imposed for first-time and repeat offenders convicted of violating §625(6). The Vehicle Code imposes no vehicle sanctions (i.e., immobilization or forfeiture) for §625(6) violations.

After a violation of §625(6), the Secretary of State shall suspend a person's driver's license for 30 days if the person has no prior convictions within seven years. The Secretary of State may issue the person a restricted license during all or a specified portion of suspension, if the person is otherwise eligible for a license. MCL 257.319(8)(c), (12); MSA 9.2019(8)(c), (12).

If the person has one or more prior convictions within seven years, the Secretary of State shall suspend a person's driver's license for 90 days upon conviction of a violation of 625(6). MCL 257.319(8)(d); MSA 9.2019(d). There is no provision in the statute for issuing a restricted license to persons subject to this 90-day suspension.

The Secretary of State will assess four points for a violation of §625(6) or a law or local ordinance substantially corresponding to it. MCL 257.320a(1)(f); MSA 9.2020(1)(1)(f).

Note: Under MCL 257.303(2)(c), (4); MSA 9.2003(2)(c), (4), offenders convicted of certain drunk driving offenses within seven years of another prior drunk driving conviction listed in the statute will be subject to mandatory driver's license revocation for a minimum of one year. This period increases to five years for offenders convicted within ten years of two other prior convictions listed in the statute. MCL 257.303(2)(f), (4); MSA 9.2003(2)(f), (4). These provisions seem to be in conflict with the above-mentioned provisions for suspension in MCL 257.319(8)(d); MSA 9.2019(d)—the following violations or attempted violations give rise to license revocation under §303:

- **F** OUIL, OUID, or UBAL under §625(1).
- **F** OWI, under §625(3).
- **F** OUIL, OUID, UBAL, or OWI causing death of another under §625(4)
- **F** OUIL, OUID, UBAL, or OWI causing serious impairment of a body function of another, under §625(5).
- **F** Being under 21 years of age and operating a vehicle with any bodily alcohol content, under §625(6) ("zero tolerance"). (Only one zero

tolerance violation may be considered for purposes of license revocation under the statute.)

- **F** Child endangerment, under §625(7).
- **F** Operating a commercial motor vehicle with an unlawful bodily alcohol level, under §625m.
- **F** Former §625(1) or (2) or former §625b. Former §625(1) provided criminal penalties for OUIL and OUID. Former §625(2) prohibited driving with a blood alcohol content of 0.10 percent or more. Former §625b provided criminal penalties for OWI.
- **F** Operating with license suspended or revoked and causing death of another under §904(4).
- **F** Operating with license suspended or revoked and causing serious impairment of a body function of another under §904(5).
- **F** Negligent homicide, manslaughter, or murder resulting from the operation of a vehicle or an attempt to commit any of those crimes.

D. Issues

In a prosecution for a violation of §625(6), the defendant bears the burden of proving that the consumption of intoxicating liquor was a part of a generally recognized religious service or ceremony by a preponderance of the evidence. MCL 257.625(22); MSA MSA 9.2325(22).